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No. 07-1524

In the

Supreme Court of the United States

CARLOTA COPPER COMPANY,
Petitioner,

v.

FRIENDS OF PINTO CREEK, *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, ALASKA FOREST ASSOCIATION, AND NORTHWEST MINING ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. Whether the Ninth Circuit erred in holding—contrary to this Court's decision in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), a recent Minnesota Supreme Court decision, and the Environmental Protection Agency's interpretation and practice—that the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, and an implementing regulation, 40 C.F.R. § 122.4(i), prohibit the Environmental Protection Agency and the states from issuing permits for discharges from "new" sources into "impaired" waters, even though conditions are imposed that reduce net pollution of such waters and improve overall water quality.

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Founded 35 years ago, Pacific Legal Foundation (PLF) is the largest and most experienced public interest legal foundation of its kind. PLF is a nonprofit, tax-exempt corporation organized to litigate matters affecting the public interest. PLF has litigated numerous cases involving the Clean Water Act (CWA) in this and other courts, including *Rapanos v. United States*, 547 U.S. 715 (2006); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006) (cert. denied); and *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006) (cert. denied).

The Northwest Mining Association (NWMA) is a 114-year-old, 1,800 member nonprofit, nonpartisan trade-based association located in Spokane, Washington. NMWA's members reside in 35 states and are actively involved in permitting, exploration, and mining projects on federal, state, and private lands throughout the western United States. NWMA's membership represents every facet of the mining industry including geology, exploration, mining, engineering, equipment manufacturing, technical

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

services, legal services, and sale of equipment and supplies. The NWMA's members have experience with the Clean Water Act and the permitting issues raised in the instant case.

The Alaska Forest Association (AFA) is a non-profit industry trade association established in 1957. The AFA's membership includes businesses and individuals in the Alaskan timber industry. The AFA's mission is to advance the restoration, promotion, and maintenance of a healthy, viable forest products industry that contributes to the economic and ecological health of Alaska's forests and communities. AFA members often seek Clean Water Act permits for their operations, and the Ninth Circuit's decision impacts their ability to do so.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit vacated Petitioner Carlota's National Pollutant Discharge Elimination System (NPDES) discharge permit despite the uncontroverted conclusion of the Environmental Protection Agency and the State of Arizona that Carlota's project will "improve existing conditions" and Carlota's permit "would result in a net reduction in the total load of copper delivered to Pinto Creek." *In re Carlota Copper Co.*, 11 E.A.D. 692, 767 (EAB 2004). In so doing, the Ninth Circuit rejected EPA's long-standing interpretation of its own regulation in favor of a narrow interpretation that has been rejected by various state courts and conflicts with a decision of this Court.

In *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), this Court held that EPA and the states determine the

circumstances in which discharges of effluent into impaired waters are prohibited, not the courts. *Arkansas*, 503 U.S. at 108.

The practical effect of this decision is to prohibit NPDES permits that would reduce pollution in an impaired water due to offsets or other mitigation. Not only is this decision contrary to sound environmental policy, it undermines Congress' express instruction that EPA and the states should consult and pursue unique approaches to achieving the objectives of the CWA—a strategy pursued in this case.

This Court should grant the petition to resolve the conflict created by the Ninth Circuit decision in this matter of critical importance to restoration of impaired waters throughout the western United States.

ARGUMENT

I

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH A STATE SUPREME COURT DECISION ON WHETHER DISCHARGE PERMITS CONDITIONED ON REMEDIATION ARE CONSISTENT WITH THE OBJECTIVES OF THE CLEAN WATER ACT

Under the Clean Water Act, industrial operators must obtain an NPDES permit for the discharge of pollutants into the Nation's waters. 33 U.S.C. § 1342(a). Permits may be issued by the Environmental Protection Agency or any State that has "the capability of administering a permit program which will carry out the objective" of the Act. *Id.* § 1342(a)(5).

Where EPA issues the permit, the affected state must certify that the permitted discharge will satisfy state water quality standards. In this case, the EPA issued the permit to Carlota, with the approval of the State of Arizona, because the copper discharges that would issue from Carlota's mining operation would be offset by Carlota's mitigation of greater copper discharges upstream, at another site.

The EPA has proscribed stringent permit standards for waters that do not meet water quality standards established under 33 U.S.C. § 1313(a) (known as "impaired waters") by prohibiting the issuance of a permit for those new discharges that "will cause or contribute to the violation of water quality standards." 40 C.F.R. § 122.4(i). An exception applies, however, if "existing dischargers [into a water segment which does not meet applicable water quality standards] are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards." 40 C.F.R. § 122.4(i)(2).

In the decision below, the Ninth Circuit cited section 122.4(i)(2) and vacated the permit approval because "the existing discharges are not subject to compliance schedules designed to bring Pinto Creek into compliance with water quality standards." *Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1013 (9th Cir. 2007). According to the court, the compliance schedules are "a condition that must be met before a permit can be issued to a new discharger into impaired waters" regardless of the actual impact of the permitted discharge. *Id.* at 1015.

But the Ninth Circuit's conclusion is misguided. According to the regulatory language, a discharge that

will not cause or contribute to the violation of water quality standards—because of offsetting mitigation or other remediation—does not trigger section 122.4(i), and the scheduling requirement does not apply.

The Minnesota Supreme Court came to this conclusion in *In re Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502, 510 (Minn. 2007) (*Annandale*). Whereas the Ninth Circuit held that "there is nothing in the Clean Water Act or the regulation that provides an exception for an offset when the waters remain impaired and the new source is discharging pollution into that impaired water," *Friends of Pinto Creek*, 504 F.3d at 1012, the Minnesota Supreme Court in *Annandale* held just the opposite: "Nothing in the language of the regulation or the structure of the CWA prohibits [regulatory authorities] from considering offsets. . . . In light of the multitude of variables and possible approaches in determining whether a specific discharge of [pollutants] will 'cause or contribute to the violation of water quality standards,'" regulatory authorities may allow offsets "in determining whether a new source will cause or contribute to the violation of water quality standards." *Annandale*, 731 N.W.2d at 510 (citing 40 C.F.R. § 122.4(i)).

The Ninth Circuit's refusal to permit offset conditions to satisfy section 122.4(i) without compliance schedules thereby "conflicts with a decision by a state court of last resort," and this alone is grounds for review. Supreme Court Rule 10(a).

In addition, in analyzing section 122.4(i), the Virginia Court of Appeals has observed that "the issue is not the raw quantity of the [discharge materials],"

but is instead "the resulting water quality." *Crutchfield v. State Water Control Board*, 45 Va. App. 546, 558 (2005). *Crutchfield*'s conclusion that discharges that "tend to ameliorate *pro tanto* the overall quality" of a water body are not subject to section 122.4(i)'s requirements contradicts the Ninth Circuit's decision. *See id.*

The Ninth Circuit's decision therefore creates regulatory uncertainty for states that have adopted a flexible approach to discharge permitting.

II

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S OPINION IN *ARKANSAS V. OKLAHOMA*

The primary reason the Ninth Circuit vacated the discharge permit in this case was because the Environmental Protection Agency and Carlota did not show how, even with a reduction in pollutants, the stream would meet water quality standards overall. *See Friends of Pinto Creek*, 504 F.3d at 1014. While this is an important objective, this Court established in *Arkansas v. Oklahoma*, 503 U.S. 91, that nothing in the CWA prohibits all discharges that would reach waters already in violation of existing water quality standards. *Arkansas*, 503 U.S. at 107. In addition, under *Arkansas*, the circumstances in which discharges of effluent into impaired waters are prohibited are to be determined by EPA and the states, not by the courts. *See id.* at 108.

Just as Carlota's permit was issued with the understanding that overall pollution in an impaired water would be reduced due to Carlota's offset

activities, *see In re Carlota Copper Co.*, 11 E.A.D. at 767, this Court in *Arkansas* recognized the incremental benefits that can accrue to this Nation's waters by allowing some discharges. *See Arkansas*, 503 U.S. at 114. An appropriate balance must be reached between the outright prohibition of all new discharges, on the one hand, and potentially beneficial discharges, on the other hand: "[I]t was surely not arbitrary for the EPA to conclude—given the benefits to the river from increased flow of relatively clean water and the benefits achieved in Arkansas by allowing the new plant to operate as designed—that allowing the discharge would be even wiser." *Arkansas*, 503 U.S. at 113-14. This Court recognizes that it is not the role for courts of appeal "to decide which policy choice is the better one, for it is clear that Congress has entrusted such decisions to the Environmental Protection Agency." *Id.* at 114.

The Ninth Circuit decision, however, not only precludes EPA from considering—in the form of a net reduction of pollution—the environmental benefits of permitting a discharge into an impaired water, it also contradicts this Court's instruction that EPA has the ultimate authority to decide when discharges of pollutants into impaired waters are to be permitted.

Moreover, as Carlota notes, "[t]he practical effect of the Ninth Circuit decision is to impose a virtual *de facto* moratorium on new source discharges into impaired waters." Carlota Copper Company Petition for Writ of Certiorari at 28. This violates *Arkansas*' holding that "rather than establishing the categorical ban . . . the Clean Water Act vests in the EPA and the

States broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution." *Arkansas*, 503 U.S. at 108.

The Ninth Circuit attempted to distinguish the discharge permit at issue from the flexible approach upheld in *Arkansas* by pointing to 40 C.F.R. § 122.4(i)(2):

> The plain language . . . of the regulation . . . provides that existing discharges into [impaired waters] are 'subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.' This is not a complete ban but a requirement of schedules to meet the objective of the Clean Water Act.

Friends of Pinto Creek, 504 F.3d at 1013 (citation and emphasis omitted).

But the Ninth Circuit's analysis misses the point. Under *Arkansas*, EPA and the states are the decision-makers when it comes to discharges of pollutants into waters that are in violation of water quality standards. Under *Arkansas*, it is the prerogative of EPA and the states to determine whether a discharge will "cause or contribute" to a further violation of water quality standards, 40 C.F.R. § 122.4(i), a consideration that is required before imposing the compliance schedules that the Ninth Circuit felt were necessary in this case.

EPA evaluated Carlota's permit application in accordance with this authority. It determined that "Carlota will not cause or contribute to the violation of water quality standards but rather will improve existing conditions because the reductions that will result from its activities are greater than the projected

discharges," *In re Carlota Copper Co.*, 11 E.A.D. at 767 and, as such, compliance schedules were not necessary, contrary to the Ninth Circuit's holding.

The Ninth Circuit's opinion in derogation of EPA's authority over discharges into impaired waters, as recognized by this Court in *Arkansas v. Oklahoma*, warrants review.

III

THE DECISION BELOW UNDERMINES SOUND ENVIRONMENTAL POLICY AND THE OBJECTIVE OF THE ACT

Allowing EPA and the states to determine the propriety and nature of new discharges to impaired waters comports with sound environmental policy. The Ninth Circuit decision, however, deprives the western states of their ability to offer important contributions to the question of how to restore impaired waters.

While it is true that EPA, not Arizona, issued the NPDES permit to Carlota in this case, and that, at the time of the issuance, Arizona had not yet received NPDES administration authority, Arizona did not stand idle concerning the management of its impaired waters. Rather, the state actively participated in the permit process in accordance with Congress' instruction to federal agencies to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . and to consult with" the EPA in the exercise of its authority under the CWA. 33 U.S.C. § 1251(b). The Arizona Department of Environmental Quality (ADEQ) served as a cooperating agency in Carlota's permit application, and "expressly determined . . . that the Permit is 'protective of the water quality requirements

of the State of Arizona.'" *In re Carlota Copper Co.*, 11 E.A.D. at 743.

The Ninth Circuit's invalidation of Carlota's permit and the offset program that had been approved by ADEQ nullifies the initiative Arizona took in this case and inhibits states in the Ninth Circuit that have not received NPDES authority[2] from consulting with the EPA—as Arizona did in this case, satisfying the instruction of Congress. In addition, for these states as well as for the states that do have NPDES authority, the Ninth Circuit's invalidation of the offset program discourages "innovations at the state level [that] are likely to hold a great deal of promise as potential strategies for addressing concerns about federal approaches to environmental regulation." *See* David L. Markell, *States as Innovators: It's Time for a New Look to Our 'Laboratories of Democracy' in the Effort to Improve Our Approach to Environmental Regulation*, 58 Alb. L. Rev. 347, 355 (1994).

To be sure, for states like Minnesota and Virginia, the Ninth Circuit's decision questions their innovative offset programs that were introduced as part of their "primary responsibilities and rights . . . to . . . reduce . . . pollution." 33 U.S.C. § 1251(b). The decision not only creates a conflict with the Minnesota and Virginia decisions, but the narrow rule set out by the Ninth Circuit discourages states from adopting flexible programs to manage impaired waters. Yet, whereas "the existence of fifty state governments . . . within our federal system inherently creates both numerous

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[2] Five states have not been delegated such authority, including three states in the Ninth Circuit: Alaska, Idaho, and New Mexico. *See* http://cfpub.epa.gov/npdes/statestats.cfm (last visited June 30, 2008).

'innovation centers' and the opportunity to try a wide variety of approaches simultaneously or within short periods of time," *Markell*, 58 Alb. L. Rev. at 355, discouraging states to adopt unique initiatives in reducing pollution in impaired waters is not what Congress had in mind when it enacted the CWA.

The offset programs approved by Arizona, Minnesota, and Virginia demonstrate the innovative environmental policy that can occur when states are permitted to take responsibility for reductions in water pollution, as Congress envisioned in the Clean Water Act.

Nevertheless, the Ninth Circuit vacated Carlota's NPDES permit despite EPA's conclusions that Carlota's project will "improve existing conditions because the reductions that will result from its activities are greater than the projected discharges" and that "Carlota's permit would result in a net reduction in the total load of copper delivered to Pinto Creek." *In re Carlota Copper Co.*, 11 E.A.D. at 767.

By invalidating a permit that would result in a net reduction of pollution in an impaired water, the Ninth Circuit decision undermined the Clean Water Act's objective to "restore . . . the Nation's waters." 33 U.S.C. § 1251(a). Although the court invoked this objective in its opinion, it did so implying that the permit violated 40 C.F.R. § 122.4(i)'s requirement that new discharges not contribute to the violation of water quality standards. *Friends of Pinto Creek*, 504 F.3d at 1012 (discussing how 40 C.F.R. § 122.4(i) "corresponds to the stated objectives of the Clean Water Act to 'restore and maintain the chemical, physical, and biological integrity of the nation's waters' " (citation omitted)). But this reference to the CWA's objective of

restoration is misplaced because, as EPA concluded, "Carlota will not cause or contribute to the violation of water quality standards." *In re Carlota Copper Co.*, 11 E.A.D. at 767. Rather than issue a decision consistent with the CWA's objective, the Ninth Circuit did just the opposite in preventing Carlota from offsetting its copper discharge in an amount greater than the discharge which would bring impaired waters closer to the CWA's objective of restoration.

Impaired waters such as Pinto Creek, cannot be restored overnight. A realistic approach to impaired water restoration should allow private organizations to make incremental changes that would at least aid in restoration through a reduction in water pollution. *See* 64 Fed. Reg. 46,064 (Aug. 23, 1999): "In those water bodies which are not pristine, it should be the national policy to take those steps which will result in *change towards* that pristine state . . . . *Striving toward* . . . the pristine state is an objective which minimizes the burden to man in maintaining a healthy environment . . . ." (quoting S. Rep. No. 92-414, 92nd Cong. 1st Sess. at 76-77 (1971) (emphasis added)).

Indeed, taking small steps toward restoration is consistent with the Clean Water Act and sound environmental policy. For instance, in addition to eliminating pollution, the CWA recognized that states should consult with EPA regarding the *reduction* of water pollution. 33 U.S.C. § 1251(b). Moreover, adopting an incremental approach to environmental regulation is often a more feasible method of addressing pollution. As one scholar observed regarding New York's solid waste landfill regulatory reform,

> the New York experiment took an incremental, rather than a radical, perspective in its deliberations. That is, in revisiting the landfill closure regulations, the work group was not looking to revise the underlying environmental objectives. Instead, it was seeking the more incremental and modest result of changing the process and its requirements to save money without relaxing environmental requirements. As the work group noted: "As a result of our deliberations, we have identified instances where landfill capping procedures may be modified and the costs to local governments reduced without harming the environment or jeopardizing public health and safety."

Markell, 58 Alb. L. Rev. at 383-84.

Although Congress envisioned a flexible mandate in order to restore this Nation's impaired waters, the Ninth Circuit rejected such an approach—one that would alleviate overall pollution in an impaired water—in favor of a narrow rule that prevents any incremental reduction of pollution in impaired waters "when the waters remain impaired and the new source is discharging pollution into that impaired water." *Friends of Pinto Creek*, 504 F.3d at 1012. Under the Ninth Circuit's analysis, offset programs do not bring impaired waters closer to restoration despite the net reduction of pollution that would result from such a program. This reasoning is counterproductive and should be reviewed.

CONCLUSION

For the foregoing reasons, Amici Curiae urge this Court to grant the Petition for a Writ of Certiorari.

DATED: July, 2008.

Respectfully submitted,

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